EX PARTE OR LATE FILED

ORIGINAL

Bell Atlantic
1300 I Street, NW
Suite 400W
Washington, DC 20005

Patricia E. Koch
Assistant Vice President
Federal Regulatory
(202) 336-7823
(202) 336-7866 (Fax)

EX PARTE

May 18, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Application of GTE Corporation and Bell Atlantic Corporation For Consent to Transfer Control of Certain Licenses and Authorizations, CC Docket No. 98-184

Dear Ms. Salas:

Please file the attached letter and attachments, to Commissioner Tristani on behalf of the applicants, in the above-captioned matter.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and two copies of this letter are being submitted to the Secretary's office. Please call me if you have any questions.

Very truly yours,

Attachments

cc: Ms. D. Attwood
Ms. R. Beynon
Mr. J. Bird
Ms. M. Carey
Mr. K. Dixon
Mr. J. Goldstein
Ms. J. Mikes
Ms. P. Silberthau
Ms. S. Whitesell

Bell Atlantic Network Services, Inc.
1320 North Court House Road
8th Floor
Arlington, VA 22201
(703) 974-2944
(703) 525-6436 - FAX

Michael E. Glover
Associate General Counsel

May 18, 2000

EX PARTE

The Honorable Gloria Tristani
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In re GTE Corp., Transferor, and Bell Atlantic Corp., Transferee,
CC Docket No. 98-184

Dear Commissioner Tristani:

This letter responds to your request that we address in writing two of the questions that were discussed during the debate held earlier this week.

1. The first question you asked us to address is the significance of precedent under the Modification of Final Judgment (or MFJ) that applied to the Bell companies prior to the passage of the 1996 Act.

In response, we would like to make two points.

a. The first point is that the definition of "affiliate" in the 1996 Act was taken from the MFJ, and was intended by Congress to have the same meaning as under the MFJ. That definition, of course, defines ownership in terms of an "equity interest (or the equivalent thereof)." As a result, the MFJ precedent establishing that options or other "conditional interests" did not qualify as equity interests under the MFJ is directly relevant to the question of whether options qualify as equity under the 1996 Act.

i) The fact that the "affiliate" definition was taken from the MFJ is shown both by a straightforward comparison of the language of the two definitions, and by the relevant legislative history. With respect to the language, the terms of the definition in the 1996 Act precisely parallel the definition in the MFJ. In both cases, the definition turns on ownership or control, and, most importantly for the present purposes, defines ownership to mean an "equity interest (or

the equivalent thereof)." *See* Attachment A (comparing Section 3(1) of the 1996 Act with Section IV(A) of the MFJ). As the legislative history makes clear, this was no accident. Indeed, the definition of "affiliate" that was ultimately enacted as part of the 1996 Act was carried over from predecessor bills that were before Congress in 1992 and 1994. The Committee reports accompanying both those bills expressly state that the definition of "affiliate" was "drawn from" the MFJ, and was intended to have "the same meaning as under the MFJ." *See, e.g.*, H.R. Rep. No. 103-559(I), 103d Cong., 2d Sess. 130 (1994) (quoted in Attachment A); H.R. Rep. No. 102-850, 102d Cong., 2d Sess. 12, 182 (1992) (same).

ii) Moreover, it also is clear that, under the MFJ, options or other "conditional interests" were consistently and categorically treated B by the Court, by the Justice Department, and by AT&T itself B as *not* equity interests or their equivalent. *See* Attachment B (collecting illustrative relevant excerpts). That treatment, moreover, was wholly independent of the "size" of the option, and was wholly independent of whether the option price was fixed or pre-paid. Regardless, options did not qualify as equity interests unless and until exercised.

Indeed, in a long line of cases, the Justice Department approved, and Judge Greene allowed, options and other conditional interests to be acquired by Bell Companies in prohibited businesses, including interLATA businesses. In the course of doing so, they made clear that options do not constitute equity interests. For example, in the proceeding in which Judge Greene approved the first such option, allowing NYNEX to acquire a fixed price option to acquire 100 % of a business engaged in the interLATA business, the Justice Department concluded that, "during the interim period [while NYNEX held the option], NYNEX would not have any kind of equity interest in Tel-Optik." Report of the United States to the Court Concerning Proposed Purchase by NYNEX Corp. of Conditional Interest in Tel-Optik, Ltd., at 10, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. filed June 20, 1986); *See also id.* at 12 ("The conditional interest to be secured by NYNEX does not constitute an 'equity interest' as that term is normally used"). Likewise, Judge Greene emphasized that it is "undisputed that NYNEX is not proposing, at this juncture, acquisition of an equity interest in Tel-Optik." Memorandum (re Tel-Optik), *United States v. Western Elec. Co.*, No. 82-0192, August 7, 1986, at 2. And Judge Greene expressly contrasted the acquisition of an option, which "shall not" require "the approval of the Court," with the "actual acquisition by a Regional Holding Company of an equity interest in an entity engaged in activities prohibited by the decree [which] may not occur without a waiver granted by the Court." *Id.* at 6.

This consistent interpretive history under the MFJ, which makes clear that options and other conditional interests are not equity interests, is dispositive of AT&T's erroneous claim here that options *always* constitute equity interests.

b. The second point is that the precedent relied on by AT&T interpreting a different term is not relevant. Specifically, the MFJ also contained another term – "affiliated enterprise" – that expressly was not included in the 1996 Act. In fact, while the predecessor of the bill that ultimately was enacted did include this separate term, it was dropped from the version of the bill

enacted into law in favor of "affiliate." As a result, precedent interpreting or applying this separate term B which was defined more broadly than the term "affiliate" B is not relevant.

i) There is no question that, under the MFJ, the term "affiliated enterprise" had a different and broader meaning than the term "affiliate." *United States v. Western Elec. Co.*, 12 F.3d 225, 227 (D.C. Cir. 1993) (quoting § II(D)). As the D.C. Circuit made clear, "'affiliated enterprise' has a *broader* meaning" than the term "affiliate" defined under Section IV(A) of the MFJ. *Id.* at 230 (emphasis added). And the Court explained that this "broader" term "was intended to cover certain contractual relationships *not involving ownership or control.*" *Id.* (emphasis added). Indeed, the briefing before the D.C. Circuit and Judge Greene in the *Tel-Optik* proceeding makes unmistakably clear the agreement of all participants that, at a minimum, an "affiliate" under Section IV(A) was an "affiliated enterprise." The only dispute was the extent to which, if at all, the "affiliated enterprise" standard encompassed *more*. And the unequivocal answer was that it did.

Congress likewise understood that "affiliated enterprise" was defined by court decisions under the MFJ to be broader than "affiliate." As noted above, the 1994 House predecessor of the 1996 Act included both terms and gave side-by-side definitions of both. *See* H.R. Rep. 103-559(II), 103d Cong., 2d Sess. 18 (1994) (Sections 106(1) and (2)). The "affiliated enterprise" definition in the predecessor bill expressly assigned the phrase the meaning that it had under "the Modification of Final Judgment." *Id.* And the House report for that predecessor bill expressly noted that "affiliated enterprise," as defined "in court opinions rendered under the MFJ" (*id.* at 216, citing *Western Elec. Co.*, 12 F.3d 225), "includes *not only ownership and corporate control relationships*, but also other economic relationships under which the BOC has a stake in the revenues of another company" (*id.* at 216-17) (emphasis added). *See also id.* at 228 ("affiliated enterprise" is "interpreted in United States v. Western Elec. Co., Civil Action No. 82-0192 (D.D.C. Jan. 21, 1992), aff'd, 12 F.3d 225 (D.C. Cir. 1993). . . . As the court opinions make clear, the term 'affiliated enterprise' includes not only ownership and corporate control relationships, but also other economic relationships under which the BOC has a stake in the revenues of another company"). Having recognized the difference, however, in the bill ultimately enacted as the 1996 Act, Congress rejected the broader term "affiliated enterprise" in favor of the narrower "affiliate."

It is therefore decisive that even the broader "affiliated enterprise" standard did not apply simply because a BOC obtained an option to acquire stock in another company, including a transferable fixed-price option for 100 percent of the company (and indeed one that would be exercised at a nominal price). If such an option were an "equity interest" or its "equivalent," it would have squarely fallen under Section IV(A)'s "affiliate" definition and, for that reason, would automatically have come under the more encompassing "affiliated enterprise" standard. Because such options were repeatedly held to fall outside the MFJ's broader prohibition, they were *a fortiori* outside the narrower "affiliate" definition and, hence, not equity interests or their equivalent.

All of this, of course, comports fully with what the MFJ Court, the Department of Justice and AT&T all concluded B that options and other conditional interests do not constitute "equity interests" or their equivalent until exercised. As Judge Greene explained when a Bell company purchased a fixed price option to acquire 100 % of a business engaged in the interLATA business, it is "undisputed that NYNEX is not proposing, at this juncture, acquisition of an equity interest in Tel-Optik." Memorandum (re Tel-Optik), *United States v. Western Elec. Co.*, No. 82-0192, August 7, 1986, at 2.

ii) This history explains why precedent interpreting or applying the broader phrase "affiliated enterprise" is simply not relevant under the 1996 Act. In particular, AT&T has pointed to Judge Greene's separate standard (articulated as a sufficient condition for approval by the Department of Justice without resort to the Court) for determining whether an option or other conditional interest gave rise to an "affiliated enterprise" relationship. Under that standard, BOC investments, including conditional interests such as an option, had to be "relatively minor" in relation to the BOCs' main businesses. Memorandum (re Tel-Optik), *United States v. Western Elec. Co.*, No. 82-0192, August 7, 1986, at 5. That standard, however, has no counterpart in the 1996 Act, and quite simply neither had nor has anything to do with whether a particular option was or is an "equity interest" or its "equivalent." Nothing in the logic or usage of those terms makes a connection between those terms and the ratio of an investment to the *BOC's size.* If a 100% option bought for $10 million does not create an "equity interest (or the equivalent thereof)," an option bought for a substantially higher price is no more an "equity interest (or the equivalent thereof)." The two concepts are unrelated.

Rather, Judge Greene set forth the "relatively minor" standard in the option context *because that was already a standard for BOCs being allowed to own an actual equity interest* in ventures other than their core local telephone businesses. Thus, Judge Greene, in enforcing the restriction against "affiliated enterprises," had previously ruled that he would permit waivers to acquire otherwise-barred businesses only on the condition that such businesses "involve relatively minor expenditures." *United States v. Western Elec. Co.,* 592 F. Supp. 846, 872 n.108 (D.D.C. 1984), *appeal dismissed,* 777 F.2d 23 (D.C. Cir. 1985). Specifically, Greene ruled that "the Court will require that the bulk of the investments of the Regional Holding Companies remain in decree-related activities [*i.e.,* providing intraLATA telephone service]. Accordingly, the Court will not, for the present, grant line of business waivers for activities the total estimated net revenues of which exceed ten percent of a Regional Holding Company's total estimated net revenues." *Id.* at 871-72 (footnotes omitted). The "relatively minor" standard Judge Greene announced for options was nothing more than a reflection of the already announced principle that an equity interest itself, ***after*** receipt of a waiver, should involve no more than "relatively minor expenditures."

Judge Greene's "relatively minor" standard for conditional interests thus did not even purport to relate to, and in no way affects, the recognition that an option was not itself an equity interest or its equivalent under the MFJ. The 1996 Act contains no counterpart to Judge Greene's "relatively minor" standard. Once a BOC gets relief under Section 271, there is no

requirement that a BOC limit its expenditures in entering the long distance business; accordingly there is no reason to limit the dollar price of the options that precede such entry. The standard relied on by AT&T is, therefore, irrelevant to the "affiliate" issue under Section 3(1) of the 1996 Act. 47 U.S.C. § 153 (1).

Even if the "relatively minor" requirement applied, however, we would meet it because it was intended to avoid distraction of the BOCs from their core responsibilities. Judge Greene imposed this requirement (both on options and on the waiver businesses themselves) to keep the BOCs focused on providing good local telephone service. *See* 592 F. Supp. at 861-67, 871-72. In the context of the 1996 Act and Section 271, the analogous requirement would be that the BOCs not be distracted from opening their local markets to competition. Here, the size and prepaid nature of the Genuity option ensures that Bell Atlantic will remain focused on opening its local markets.

Finally, focusing on the numbers as Judge Greene used them, this transaction is "relatively minor." The standard set out by Judge Greene for limiting waiver businesses was a revenue ratio. In the Tel-Optik option case, the company that was the subject of the option was not yet a going business and Judge Greene used NYNEX's upfront option payment as a proxy for revenues in estimating whether NYNEX would stay within the 10% revenue cap that he had imposed on waiver businesses. Here, Genuity is already a going business and its revenues (approximately $700 million in 1999) are substantially below 10% of Newco's revenues (approximately $56 billion in 1999).

2. The second question you asked us to address is whether the Commission has flexibility to interpret and apply the Act's definition of "affiliate" on a fact-specific and context-specific basis, including by taking into account the purposes of the particular provision of the Act that is at issue in appropriate instances.

We believe that, in critical respects, the answer is yes. While we do not believe that this conclusion is necessary to approve our proposal here, it does mean that the Commission would retain flexibility to reach a different conclusion in the future where the facts and circumstances differ.

a. As explained above, the term "equity interest" in the "affiliate" definition was consistently interpreted under the MFJ to *not* include options or other future interests. Moreover, precisely because Congress took the definition of affiliate directly from the MFJ, the immediate precursor of Section 271, it is clear that Congress had Section 271 in mind when it adopted that definition. The legislative history also makes clear that Congress intended to preserve the meaning of "equity interest" under the MFJ. Consequently, interpreting the term "equity interest" in the affiliate definition in a manner consistent with the interpretation of that term under the MFJ is itself necessarily both consistent with Congressional intent and appropriately takes the Congressional purposes underlying Section 271 into account.

Of course, interpreting the term "equity interest" to exclude options also is fully consistent with common legal usage. *See, e.g., Powers v. British Vita, P.L.C.*, 969 F. Supp. 4, 5 (S.D.N.Y. 1997) ("Many cases hold that an option contract does not qualify as an equity interest"); *Association of Flight Attendants v. US Air Inc.*, 24 F.3d 1432, 1435 (D.C. Cir. 1994) ("US Air has no present equity interest in Shuttle, but it has an option to purchase a controlling interest in the company"). And it also is consistent with other relevant legal authority, including the Commission's own rules, which treat options and other convertible interests only as "potential future equity interests" until exercised, and with the antitrust laws, which exempt the acquisition of "convertible voting interests" from Hart-Scott-Rodino reporting requirements. *See* Attachment C (excerpting key relevant authorities).

AT&T says that, because the definition of "affiliate" is a general provision that applies to several sections of the Act, it must be given a "uniform" meaning that does not take the purposes of Section 271 into account and that treats all options or other future interests as current equity interests. There are several reasons that this absolutist proposition is fatally flawed. Among others, a categorical rule that all options constitute equity interests would be fundamentally inconsistent with Congressional intent, with precedent under the MFJ, with common legal usage, and with the Commission's own rules. Consequently, if AT&T is right that the term "equity interest" must be given a uniform meaning, then the only reasonable interpretation is that options do not count. Indeed, the contrary rule urged by AT&T would mean that every provision of the Act or the Commission's rules that applies to a given entity and its affiliates would suddenly apply to mere option holders – even though the option holder has no ability to control the activity that is being regulated.

Moreover, the authorities that AT&T relies upon as a basis for its argument that options must be classified as equity interests are not relevant here. AT&T relies principally upon authorities interpreting different terms (typically "equity securities") from different statues (such as the securities or bankruptcy laws) that serve different purposes (such as preventing trading on insider information or determining priority of claims in bankruptcy). Even farther afield, AT&T has even been forced to the extreme of relying on a set of ALI Principles drafted by a group of professors as a statement of what they think the law *should be* on the unrelated issue of who can bring a derivative suit on behalf of a corporation, and does not purport to be a statement of what the law actually *is*. AT&T simply cannot plausibly maintain that these tangential sources of authorities require an absolutist conclusion that options and other future interests always qualify as current "equity interests" under the 1996 Act.

b. Of course, if the Commission concludes that options are not equity interests, it would still retain significant flexibility in interpreting and applying the definition of "affiliate." AT&T itself appears to concede that at least some of the terms in the affiliate definition do not have a single fixed meaning, and must be interpreted and applied in a fact-specific and context-specific manner. Indeed, the lead-in to the very definition at issue here itself says that the definition applies "unless the context otherwise requires." 47 U.S.C. § 153.

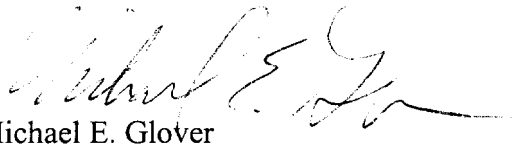
This is especially true for terms such as "control" or "equivalent" that necessarily must be applied based on the totality of the circumstances, taking into account the purposes of the particular section in which they are being applied. Indeed, when it comes to the term "control" AT&T readily agrees, and has expressly acknowledged that the meaning of "control" depends on context and on the "totality of the circumstances." *See* Coffee Decl. & 9, AT&T March 10 Ex Parte at 9-12. Likewise, as Judge Williams of the D.C. Circuit concluded where the term was used in a similar definition, "[w]hat 'the equivalent thereof' means in the above definition is not clear." But where a statutory term is unclear, it is up to the Commission to interpret the term in a way that "is reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language." *See Public Citizen v. Carlin*, 184 F.3d 900, 903 (D.C. Cir. 1999), *cert. Denied*, 120 S. Ct. 1267 (Mar. 6, 2000). As discussed above, moreover, Congress defined "affiliate" primarily to serve as a definition for 271 and intended for the term to be construed in light of the purposes of Section 271.

Moreover, because terms such as "control" and "equivalent" are not defined, the practical effect of the definitional provision is to incorporate those terms by reference into each separate provision where the word "affiliate" is used. To the extent that these terms are ambiguous or subject to a range of possible interpretations, therefore, they may be construed differently depending on the purposes of the particular sections in which they appear and are applied. *See, e.g. Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 432 (1932) (construing the term "restraint of trade or commerce" differently in two sections of the same statute); *US WEST Communications, Inc. v. FCC*, 177 F.3d 1057, 1059-60 (D.C. Cir, 1999) (upholding FCC's decision to construe "provide" in Section 271 differently than in other provisions in the Communications Act); *Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990) (agency may "interpret an imprecise term differently in two separate sections of a statute which have different purposes").

All in all, therefore, there is no genuine dispute that the Commission may interpret and apply at least some of the terms in the "affiliate" definition based on the specific facts and in light of the policies of the particular provision at issue. By doing so, the Commission can preserve for itself the flexibility to reach different conclusions in the future based on different facts and circumstances. Here, however, our proposal is consistent not only with the letter of the law, but also with the purposes of the provision at issue because it will significantly increase the merged company's already substantial incentive to satisfy the requirements of Section 271 as quickly as possible.

Thank you for your careful attention to these issues.

Sincerely,



Michael E. Glover

cc: Ms. D. Attwood
Ms. R. Beynon
Mr. J. Bird
Ms. M. Carey
Mr. K. Dixon
Mr. J. Goldstein
Ms. J. Mikes
Ms. P. Silberthau
Ms. S. Whitesell

ATTACHMENT A

The Definition Of "Affiliate" In Section 3(1) Was Taken From The MFJ And Was Intended To Have The Same Meaning

- Section 106 of the Antitrust and Communications Reform Act of 1994 was the predecessor of the Telecommunications Act of 1996.

  See 142 Cong. Rec. H1145 (Feb. 1, 1996) (Rep. Markey); 141 Cong. Rec. H8269 (Aug. 2, 1995) (Rep. Bliley); H.R. Rep. 104-204(I), 94th Cong., 1st Sess. 203 (1995).

- Section 106 contained the following definition of "affiliate":

  > The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, to own refers to owning an equity interest (or the equivalent thereof) of more than 50 percent.

  H.R. Rep. No. 559(I), 103d Cong., 2d Sess. 20 (1994) (Energy and Commerce Committee).

- Congress intended section 106 to incorporate MFJ precedent:

  > Section 106 of the bill contains the definitions to the terms used in title I of the Act. The definition of "affiliate," "carrier," "customer premises equipment," "electronic publishing," "exchange area," "exchange service," "information," "interexchange telecommunications," "telecommunications," "telecommunications equipment," "telecommunications service," and "transmission facilities" are drawn from definitions in the MFJ. ***The Committee intends that these terms have the same meaning as under the MFJ.***

  H.R. Rep. No. 559(I), 103d Cong., 2d Sess. 130 (1994) (emphasis added); *see also* H.R. Rep. 103-559(II), 103d Cong., 2d Sess. 227 (1994) (Judicial Committee) (same).

ATTACHMENT B

The Department Of Justice, Judge Greene And AT&T Concluded That Under The MFJ, Options And Other Conversion Interests Are Not "Equity Interests" Or Ownership

- The Department of Justice:

> "During the interim period [while NYNEX held the option], ***NYNEX would not have any kind of equity interest*** in Tel-Optik." Report of the United States to the Court Concerning Proposed Purchase by NYNEX Corp. of Conditional Interest in Tel-Optik, Ltd., at 10, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. filed June 20, 1986) (emphasis added).
>
> "The conditional interest to be secured by NYNEX ***does not constitute an 'equity interest'*** as that term is normally used." *Id.*, at 12 (emphasis added).
>
> "NYNEX Will ***Not Acquire an Equity Interest*** in Tel-Optik As a Result of the First Step of the Proposed Transaction." *Id.*, at 12 (emphasis added).

- Judge Greene:

> "In order to avoid unnecessary delay and undue interference with business decisions, the approval of the Court shall not be required [when a Bell company initially acquires an option]. However, as discussed below, the actual acquisition by a Regional Holding Company of an equity interest in an entity engaged in activities prohibited by the decree may not occur without a waiver granted by the Court . . . ." Memorandum at 6, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Aug. 7, 1986).

- AT&T:

> "For example, what if an RHC secretly paid a billion dollars for a long-term transferrable option to purchase 100% of a major manufacturer at a nominal price. * * * The RHC could then sell the option and profit from the manufacturing business, without ever seeking a waiver. * * * [T]he very conduct the Decree sought to end would occur for years, ***without an RHC ever owning an actual equity interest*** in the manufacturer . . . ." Brief of AT&T, *United States v. Western Elec. Co.*, No. 86-5641, at 14-15 (D.C. Cir. filed June 26, 1989) (emphasis added).
>
> "LACTC has two partners: (1) LIN Cellular Communications Corporation, a California corporation ('LIN Cellular'), in which ***McCaw holds a 52% equity interest and an option to acquire the remaining equity***, effective in January 1995 . . . ." Affidavit of Professor John C. Coffee, Jr., at 9, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. filed May 24, 1994) (emphasis added).
>
> LIN was "52%-owned" by McCaw. AT&T's motion for a Waiver of Section I(D), at 8, *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. filed June 7, 1994).
>
> "QUESTION [from the D.C. Circuit Bench]: Some of those options were not [prohibited] under the original decree.
> MR. CARPENTER: Some of those options would violate section 2 [of the MFJ] and some wouldn't."
> Oral Argument Tr. at 25, *United States v. Western Elec. Co.*, Nos. 86-5641 & 86-5642 (D.C. Cir., Oct. 24, 1989).

ATTACHMENT C

Authorities Establish That Options And Other Conversion Rights Are Not "Equity Interests" And Do Not Constitute Ownership

- Options and conversion rights are not "equity interests":

> "Many cases hold that ***an option contract does not qualify as an equity interest.***" *Powers v. British Vita, P.L.C.*, 969 F. Supp. 4, 5 (S.D.N.Y. 1997) (emphasis added).

> "USAir has ***no present equity interest*** in Shuttle, but it has ***an option*** to purchase a controlling interest in the company effective October 10, 1996." *Association of Flight Attendants v. USAir Inc.*, 24 F.3d 1432, 1435 (D.C. Cir. 1994) (emphasis added).

> "A ***debenture*** is a credit instrument which ***does not devolve upon its holder an equity interest*** in the issuing corporation . . . . Similarly, the convertibility feature of the debenture does not impart an equity element until conversion occurs." *Simons v. Cogan*, 549 A.2d 300, 303-04 (Del. 1998) (emphasis added).

- Options do not constitute ownership:

> "An option to purchase stock does not vest in the prospective purchaser ***an equitable title to, or any interest or right, in the stock.***" *Ball v. Overton Square, Inc.*, 731 S.W.2d 536, 540 (Tenn. Ct. App. 1987) (emphasis added).

> "An option to purchase stock does not vest in the prospective purchaser ***an equitable title to, or any interest or right in, the stock.***" 12A Fletcher Cyclopedia of Private Corp. § 5575 (1993) (emphasis added).

Under Commission Precedents Options And Other Conversion Rights Are Not Cognizable Ownership Interests

- The former cable/telco cross-ownership rules

  > "Interests with rights of conversion to equity, including debt instruments, warrants, convertible debentures, and options, shall not be included in the determination of cognizable ownership interests unless and until conversion is effected." 47 C.F.R. § 63.54(e)(5); *Telephone Company-Cable Television Cross-Ownership Rules*, 10 FCC Rcd 244 (1994).

- Section 310's foreign-ownership ban

  > "[A]n option held by a foreigner to buy stock in a licensee or the parent of a licensee is not cognizable until it is exercised." DCR PCS, Inc., Order, DA 96-1816, ¶ 24 (Wireless Bureau Nov. 4, 1996).

- LEC/LMDS cross-ownership rules

  > "Debt and interests such as warrants and convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not constitute attributable interests unless and until conversion is effected." Local Multipoint Distribution Service and Fixed Satellite Services, 12 FCC Rcd 12545 (1997) (adopting 47 C.F.R. § 101.1003(e)(5)).

- CMRS spectrum cap rules:

  > "Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until conversion is effected." 47 C.F.R. § 20.6(d)(5).

Hart-Scott-Rodino Merger Review

- The acquisition of an option or other interest convertible into voting stock does not count as the acquisition of a cognizable ownership interest for purposes of antitrust review under the Hart-Scott-Rodino Antitrust Improvements Act:

> Acquisitions of convertible voting securities shall be exempt from the requirements of the act.
>
> *Example*: This section applies regardless of the dollar value of the convertible voting securities held or to be acquired and even though they may be converted into 15 percent or more of the issuer's voting securities. Note, however, that subsequent conversions of convertible voting securities may be subject to the requirements of the act. See § 801.32.

16 C.F.R. § 802.31.